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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31

WYANDOTTE TRANSPORTATION CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 150) is reported *sub nom. United States of America* v. *Cargill, Inc., et al.*, at 367 F. 2d 97. The opinion on petition for rehearing *en banc* (R. 172) is reported at 367 F. 2d 979. The opinion of the district court (R. 146) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1966 (R. 166), and a petition for rehearing *en banc* (R. 167) was denied on September 12, 1966 (R. 172). The petition for a writ of certiorari was filed on December 7, 1966, and granted on Feb-

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ruary 13, 1967 (R. 174; 386 U.S. 906). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

The statutes and regulation involved are set forth in the appendix to this brief, pp. 53–60 *infra*.

QUESTION PRESENTED

Whether one who negligently causes a vessel to sink and obstruct navigation in an inland waterway may, by abandoning it, avoid personal responsibility for the removal of the vessel or the cost of removal.

STATEMENT

This case involves two separate actions, consolidated by the district court (R. 145), both arising out of the negligent sinking of vessels in the Mississippi River. The United States commenced these libels to establish petitioners' responsibility either to remove the sunken vessels or to reimburse the government for the net cost of their removal.

1. *The WYCHEM action.*[1] On March 23, 1961, the barge WYCHEM 112, loaded with 2,220,000 pounds of liquid chlorine sank in the Mississippi River near Vidalia, Louisiana (R. 22–23). The chlorine was stored on the WYCHEM in four chemical tanks, each 75 feet long and 11½ feet in diameter (R. 22), and containing some 275 tons of chlorine (R. 26).[2] The

[1] *United States of America* v. *2,220,000 Pounds Chlorine Cargo ex Barge WYCHEM 112 and Containers, in rem, and Union Carbide Corp., Wyandotte Transportation Co., and Union Barge Line Corp., in personam* (E.D. La., Adm. No. 668) (R. 1).

[2] As noted in the libel (R. 26), this is more chlorine than the

chlorine in these tanks was under pressure and if any escaped it would be in the form of deadly chlorine gas (R. 24, 73). Estimates were made that escape of the gas might cause 40,000 to 50,000 casualties, with 10,000 to 25,000 fatalities (R. 25). Even a single small leak in the valves of the storage tanks could result in the release of all of the chlorine gas (R. 24).

The owner and operators of the WYCHEM, and their underwriters, made some efforts to locate and raise the barge and its deadly cargo (R. 24). However, in November, 1961, the owner of the WYCHEM—petitioner Wyandotte Transportation Company, a wholly owned subsidiary of the Wyandotte Chemicals Corporation[3]—notified the Corps of Engineers that further efforts to locate and salvage the wreck would be unsuccessful; that it would assume no further responsibility for the barge or its cargo; and that it was abandoning the vessel (R. 40–41).[4]

Germans used in their first chlorine gas attack in 1915 at Ypres which caused 5,000 deaths.

[3] An affidavit (R. 33–35) filed in the district court by the Wyandotte Transportation Co. alleged that while it had been owner of the WYCHEM, the barge was being operated by its parent corporation, Wyandotte Chemicals Corp., under a bare-boat charter at the time of the sinking. The government thereafter moved to amend its libel to add Wyandotte Chemicals Corp. as an additional party (R. 144). The district court's dismissal of the action made it unnecessary for it to rule on this motion, and therefore neither the district court nor the court of appeals acted upon it. Presumably the district court will decide the motion upon remand, if the judgment of the Fifth Circuit reinstating the libel is affirmed.

[4] The court of appeals, noting that the record indicated a possible conflict of evidence on the question of the government's acceptance of abandonment, expressly refrained from

The Wyandotte Chemicals Corporation rejected a demand by the government that the wreck be removed (R. 25).

After the grave danger presented by the sunken vessel was fully appraised by government agencies, including the Public Health Service and the Office of Emergency Planning (R. 25), the President of the United States, on October 10, 1962, proclaimed a major disaster under the Disaster Relief Act[5] (R. 25). The United States then undertook to abate the emergency and avert a catastrophe by locating the WYCHEM, and raising and removing over a thousand tons of chlorine. These efforts were successful. In the course of the operation, the government incurred expenses of approximately $3,081,000 (R. 28).[6]

When the owners and operators of the WYCHEM refused to reimburse the United States for these expenses, the government instituted a libel *in rem* against the salvaged chlorine cargo (R. 20) and *in personam* against the owner of the WYCHEM (petitioner Wyandotte Transportation Co.), the owner of

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resolving the issue since the question of abandonment *vel non* was not necessary to the decision of the court (R. 153). The district court had concluded as a matter of law that the government accepted the abandonment by attaching, seizing, and selling the wreck when it was raised from the river (R. 146–147).

[5] 42 U.S.C. 1855–1855g. The Governor of Mississippi also proclaimed a major disaster (R. 25).

[6] $1,565,000 was for engineering expenses while the remaining $1,516,000 was for public health and safety expenses, including necessary precautions against a possible rupture in the tanks during salvage operations (R. 28). For a description of the salvage operations, see Fales, "Time Bombs in the Mississippi," Popular Sci. Monthly, April, 1963 (R. 72–85).

the tow boat that had been pushing the WYCHEM when it sank (petitioner Union Barge Line Corp.), and the owner of the chlorine cargo (Union Carbide Corp.) (R. 20–22).

The libel alleged that the sinking of the WYCHEM was caused solely by the "fault and neglect" of Wyandotte, Union Barge, and Union Carbide (R. 26). Enumerated in the libel were some sixteen separate acts of negligence (R. 26–28), including inadequate manning, a failure to fasten a hatch cover on the barge, improper design of the barge, lack of essential equipment, dangerous towage procedures, and general unseaworthiness. The relief requested was a decree for the damages suffered by the government in removing the wreck (R. 28–29).

Upon motion of the government, the district court ordered the sale of the chlorine cargo and containers, seized by the marshal at the commencement of the suit (R. 29–30), and directed the payment of the $85,000 in proceeds into the registry of the court, pending final disposition of the litigation (R. 31). Thereafter, motions to dismiss the libel made by each of the parties sued *in personam* (R. 32, 44, 46) were consolidated for decision with similar motions in the second of the two actions (R. 145).

2. *The Cargill action.*[1] The libel in this action alleged the following (R. 12–18): At the end of March 1961, the barges M 65 and L 1 were moored by a tug,

[1] *United States of America* v. *Cargill, Inc., Cargo Carriers Inc., Inland Rivers Transp. Co., Jeffersonville Boat and Machine Co., Continental Ins. Co., Travelers Ins. Co.* (E.D. La., Adm. No. 667) (R. 1).

time chartered to petitioner Cargo Carriers, Inc., at the Cargill, Inc. fleet mooring, mile 227.5 above Head of Passes, Baton Rouge, Louisiana (R. 14). At approximately 3:32 A.M. on March 31, 1961, near mile 224 above Head of Passes, the super tanker ESSO ZURICH collided with and sank an unmanned and unlighted barge that had been drifting in the channel (R. 14). The bow lookout on the ESSO ZURICH had seen two unlighted barges, only one of which was hit (R. 14). At 1:24 P.M. later that day, petitioner Cargo Carriers notified the Corps of Engineers that barges L 1 and M 65 had been sunk that day (R. 14), and subsequently the Corps of Engineers was notified that both barges were being abandoned (R. 15). The United States refused to accept abandonment or assume responsibility for removing the wrecks (R. 15).

The United States then brought suit against the owners, managers, charterers, and insurers[8] of the two barges, alleging that negligence in the condition and mooring of the barges had caused their sinking in the navigable waterway (R. 17). In its prayer for relief, the United States sought a decree that the respondents named in the libel had the responsibility and liability for marking and removing the wrecks (R. 17–18).

[8] Suit against the insurers was brought pursuant to the Louisiana Direct Action Statute, 15A La. Rev. Stat. 22:655 (R. 17). Respondent Continental Insurance Co. covered these barges under a standard type Inland Protection and Indemnity form which included coverage for "any attempted or actual raising, removal or destruction of the wreck of the insured vessel or the cargo thereof, or any neglect or failure to raise, remove or destroy the same" (R. 16–17).

3. *The decisions below.* The district court entered summary judgment against the government in each action on the ground that "the only right * * * that the United States Government has to recover its expenses is a right in rem against the vessels themselves" (R. 147). The Court of Appeals for the Fifth Circuit reversed and remanded, holding that under the Rivers and Harbors Act of 1899 (30 Stat. 1151, 33 U.S.C. 401, *et seq.*) those persons responsible for the negligent sinking of a vessel in navigable waters are liable *in personam* for the removal or the cost of removal of the vessel. The court noted that Section 10 of the Act (33 U.S.C. 403) prohibits "the creation of any obstruction" to navigation and that Section 15 (33 U.S.C. 409) specifically makes it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." Relying, *inter alia,* on *United States* v. *Republic Steel Corp.,* 362 U.S. 482, the court held that the statutory prohibition in Section 10 implicitly recognizes the availability of the remedies of injunction or monetary damages, imposing on the tort-feasors the burden of removing vessels sunk as the result of their negligence. The court remanded the case to the district court for trial on the issue of negligence. Petitioners' applications for rehearing *en banc* were denied (R. 172).[9]

[9] On petition for rehearing filed by the consignee-owner of the chlorine cargo, Union Carbide Corp., the court of appeals affirmed the summary judgment entered in its favor, on the ground that "there are no allegations or proof of negligence" on its part (R. 172). That determination is not before this Court for review.

SUMMARY OF ARGUMENT

I

The Rivers and Harbors Act of 1899 prohibits the negligent sinking of vessels in navigable waterways. Two separate sections of the Act embody this prohibition. Section 10 makes unlawful the creation in navigable waters of "any obstruction" not authorized by Congress. Section 15 makes it unlawful to "carelessly sink, or permit or cause to be sunk," a vessel in navigable waters. Under well settled principles of law, recently applied by this Court in *United States* v. *Republc Steel Corp.*, 362 U.S. 482, these prohibitions can be enforced by resort to appropriate judicial remedies, even if the statute itself does not precisely define them. Accordingly, the court below correctly held Section 10 conferred upon the government the right to obtain a mandatory injunction to compel those responsible for the negligent sinking of vessels to remove them and, where the vessels have been removed by the government, the right to recover *in personam* the cost of removal from those who caused the obstruction.

The rationale of the court's holding that Section 10 creates *in personam* liability applies with at least equal force to Section 15. The declaration in Section 15 that it is unlawful to cause a vessel to sink in a navigable waterway necessarily presupposes the existence of effective judicial remedies. Thus Section 15 provides an alternative basis for affirmance.

The liability imposed by the Act cannot be defeated by the expedient of abandoning the sunken vessel. Under the general maritime law and the Limitation of Vessel Owner's Liability Act of 1851, a person who negligently sinks a vessel remains personally liable for the consequences of his fault even though he abandons his vessel. Nothing in the Rivers and Harbors Act of 1899 alters this policy. Therefore, the mere fact that the negligently sunken vessel has been abandoned by those responsible for the sinking does not relieve such persons of liability under the Rivers and Harbors Act for removing the vessel or paying the cost of removal.

II

The Rivers and Harbors Act of 1899 was passed as a compilation of legislation affecting the navigable waterways. It did not, and was not intended to, displace completely the corpus of non-statutory law in this area. Under non-statutory law, a vessel negligently sunken in navigable waters constitutes a public nuisance which must be abated by those who created the nuisance, or they are liable for the expenses of one who lawfully abates the nuisance. Because of its regulatory and proprietary interests in the Mississippi River, the United States is entitled to invoke the non-statutory law to compel those who created a nuisance by negligently sinking their vessels to abate the nuisance, or to abate the nuisance itself and compel those responsible for it to reimburse the government for expenses reasonably incurred.

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ARGUMENT

I. THE RIVERS AND HARBORS ACT OF 1899 PROHIBITS THE NEGLIGENT SINKING OF A VESSEL IN A NAVIGABLE RIVER AND REQUIRES THOSE RESPONSIBLE TO REMOVE THE VESSEL OR PAY THE COST OF REMOVAL

The Rivers and Harbors Act of 1899 [10] was part of a "great design" to facilitate the unimpeded flow of commerce over the waterways of the Nation by assuring the existence of navigable channels free of obstructions. *United States* v. *Republic Steel Co.*, 362 U.S. 482, 492. It is clearly inconsistent with this legislative plan to permit those who own, operate, or use vessels on our public rivers to avoid personal responsibility for the consequences of unlawfully obstructing the navigable waters by negligently sinking their vessels. Sensitive to this reality, the court below—and dissenting judges in other recent cases presenting the same question—correctly construed the Act as imposing on persons who negligently sink vessels the liability for removing them or for paying the cost of their removal.

The court below found that Section 10 of the Act (33 U.S.C. 403) creates such liability because a sunken vessel is an unlawful "obstruction" within the meaning of that section. In *United States* v. *Bethlehem Steel Co.* (*The Texmar*), 319 F. 2d 512 (C.A. 9), certiorari denied, 375 U.S. 966, Judge Browning in dissent wrote that Section 15 of the Act (33 U.S.C. 409) creates personal liability in this type of case by

[10] 30 Stat. 1151, as amended, 33 U.S.C. 401–418. The relevant portions of that Act are printed at pp. 53–59 *infra*.

expressly making unlawful the careless sinking of a vessel. And Judge Sobeloff, dissenting in *United States* v. *Bethlehem Steel Co.*, 374 F. 2d 656, 669 (C.A. 4), certiorari pending, No. 130, October Term, 1967, noted that the reasoning of the Fifth Circuit in the case at bar and that of Judge Browning in *The Texmar* are consistent with each other, although each premised *in personam* liability on a different section of the Act, and recognized that each construction was in harmony with the clear language and fundamental purpose of the Act.

We submit that *in personam* liability for the negligent sinking of a vessel may be founded upon either Section 10 of the Act or Section 15, or both. We therefore set forth our arguments in the alternative, either of which we believe fully supports the imposition of personal liability by the court below.

A. PETITIONERS ARE PERSONALLY LIABLE UNDER SECTION 10 OF THE ACT FOR THE NEGLIGENT SINKING

1. A threshold question is whether a vessel negligently sunk in a river constitutes an "obstruction" forbidden by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, p. 53, *infra*. That section provides in pertinent part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * *.

The plain language of this section is broad enough to include within its prohibition the negligent sinking of a vessel in navigable waters. Moreover, the term "obstruction" as used in Section 10, consistently with

historical usage,[11] has been construed liberally so that it is clear that the term encompasses sunken vessels. As stated in *United States* v. *Republic Steel, supra,* 362 U.S. at 487–488, an obstruction is "anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States * * *" (quoting from *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690, 708). See, also, *Sanitary District* v. *United States,* 266 U.S. 405.

The provision of Section 10 of the 1899 Act prohibiting obstructions was based on a similar provision in the Rivers and Harbors Act of 1890, 26 Stat. 426, 454–455.[12] Under the prior Act, a sunken vessel, deliberately scuttled by its owners, had been held to be an "obstruction" which the government by injunction could compel the owners to remove. *United States* v. *Hall,* 63 Fed. 472 (C.A. 1). In enacting the 1899 Act, Congress expressly stated it intended to codify rather than change existing law. There was no hint that Congress did not share the understanding of the First Circuit in *Hall* that the term "obstruc-

[11] "A river may become obstructed in a variety of ways, *i.e.*, by * * * (5) vessels sunk or inconveniently moored * * *" Wisdom, *Obstructions in Rivers*, 119 Just. P. 846 (1955); see Desty, *A Manual of the Law Relating to Shipping and Admiralty* § 392 (1879); *Tyne Improvement Comm'rs v. Armement Anverssois S/A*, [1949] A.C. 326, [1949] 1 All E.R. 294 (H.L.).

The phrasing of Sections 15, 19, and 20 of the Rivers and Harbors Act of 1899, 33 U.S.C. 409, 414, 415, testifies to the understanding of the Congress that enacted Section 10 that sunken vessels are "obstructions."

[12] Section 10 of the 1890 Act prohibited "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters * * *."

tion" includes sunken vessels.[13] Thus the text of Section 10, the construction of that section by this Court, the historical understanding of the term, and the legislative history, all support the holding of the court below that in negligently causing the sinking of the barge WYCHEM, containing the 2,220,000 pounds of chlorine, and the barges M 65 and L 1, petitioners created an "obstruction" prohibited by Section 10.

2. A violation of the Section 10 prohibition is made a crime by Section 12 (33 U.S.C. 406) of the Rivers and Harbors Act.[14] The question here is whether the absence of a comparable provision explicitly granting a civil remedy for injuries caused by a violation of the prohibition precludes enforcement of the Act except by criminal prosecution.[14a] We submit the silence of the statute does not bar civil relief.

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[13] The House conferees stated the Act was intended as a "codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing law." 32 Cong. Rec. Pt. 3, 2923 (1899). See 32 Cong. Rec., Pt. 3, 2296, 2297 (1899). In *Republic Steel*, *supra*, this Court noted that the Act made "no essential changes in existing law." 362 U.S. at 486.

[14] "Every person and every corporation that shall violate any of the provisions of sections * * * 403 [§ 10] * * * of this title * * * shall be deemed guilty of a misdemeanor."

[14a] Section 12 of the Act, 33 U.S.C. 406, does provide for civil injunctive relief but only with respect to unlawful "structures". See *United States* v. *Republic Steel*, *supra*, 362 U.S. at 491. We proceed on the premise that there is no extant statutory authorization for enjoining the continuation of a prohibited "obstructions"—although that is not wholly clear. Indeed, Section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 454 (the immediate source for the same numbered section in the 1899 Act under consideration), after defining a criminal offense and the penalty, went on expressly to provide that "the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the in-

There is a well settled rule that disregard of the command of a penal statute is a wrongful act for which the courts will imply a right to recover damages from the offending party. *E.g., Texas & Pac. R.* v. *Rigsby,* 241 U.S. 33, 39–40; *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433; *North Bloomfield Gravel Mining Co.* v. *United States,* 88 Fed. 664, 678–679 (C.A. 9); *Reitmeister* v. *Reitmeister,* 162 F. 2d 691, 694 (C.A. 2); *Dann* v. *Studebaker-Packard Corp.,* 288 F. 2d 201, 208–209 (C.A. 6). It was this general principle that this Court relied on in *United States* v. *Republic Steel, supra.* In that case, the government sued to enjoin three manufacturers from dumping industrial wastes into a navigable river and to compel them to remove existing

junction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States." 26 Stat. 455. This explicit authorization was never specifically repealed. The repealer in the 1899 Act extended only to "all laws or parts of laws *inconsistent with*" the provisions of the Act. The Rivers and Harbors Act of 1899 was intended to be an integrated compilation of existing law, and was not designed to reduce the substantive protections of the navigable waterways. To the objection that the bill would revise existing law, the Senate floor manager replied: "Oh, no. There are not ten words changed in the entire thirteen sections. It is a compilation." 32 Cong. Rec. 2297 (1899). See, also, H. Doc. No. 293, 54th Cong., 2d Sess. (1897). Because the two Acts were presumed to be harmonious, for many years after the passage of the 1899 Act, courts—including this Court—continued to cite as of continuing force various sections of the 1890 Act, among them Section 10. See Comment, *Substantive and Remedial Problems in Preventing Interferences with Navigation: the Republic Steel Case,* 59 Colum. L. Rev. 1065, 1067–1068, n. 21 (1959) and cases cited; *United States* v. *Wishkah Boom Co.,* 136 Fed. 42 (C.A. 9), appeal dismissed, 202 U.S. 613. Contra, *United States* v. *Wilson,* 235 F. 2d 251 (C.A. 2).

deposits. Having concluded that the defendants were creating an "obstruction" prohibited by Section 10 of the Rivers and Harbors Act, the Court held that an action for civil injunctive relief would lie, notwithstanding the fact that the Act expressly provided only for criminal sanctions. This Court stated (362 U.S. at 492):

> * * * the Attorney General could bring suit, even though Congress had not given specific authority. The test was whether the United States had an interest to protect or defend. Section 10 of the present Act defines the interest of the United States which the injunction serves. * * * Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.

See, also, *Sanitary District* v. *United States,* 266 U.S. 405; *United States* v. *San Jacinto Tin Co.,* 125 U.S. 273; *North Bloomfield Gravel Mining Co.* v. *United States,* 88 Fed. 664 (C.A. 9).

Republic Steel directly sustains the holding of the court below that an injunction will lie against the operators of the barges M 65 and L 1 to compel them to remove these obstructions. We believe it also supports the ruling that the government may recover from those responsible for the sinking of the barge WYCHEM the cost of removing the 2,220,000 pounds of chlorine constituting an obstruction, for the imposition of removal costs is equally one of the "appropriate remedies [which] may be fashioned" from Sec-

tion 10. That is the view of at least two of the other circuits where the question has arisen. *United States* v. *Perma Paving Co.*, 332 F. 2d 754 (C.A. 2); *United States* v. *New York Central R. Co.*, 252 F. Supp. 508 (D. Mass.), affirmed *per curiam*, 358 F. 2d 747 (C.A. 1). See, also, *Restatement of Restitution*, § 115 (1937). But see, *United States* v. *Zubik*, 295 F. 2d 53 (C.A. 3). As the Court of Appeals for the Second Circuit observed in *Perma Paving*, rejecting the contention that the Act only permitted injunctive relief and not recovery of removal costs (332 F. 2d at 758):

> We can think of no sensible reason why Congress should have desired that if the executive branch chooses to effect immediate removal of an obstruction, through the services of the Corps of Engineers or otherwise, rather than resort to the slower injunctive process of the courts, the offender should thereby escape his due.

3. The immediacy of the crisis created by the sinking of the WYCHEM is ample demonstration that the United States should not be considered remediless because it proceeds with dispatch in an emergency, instead of asserting its right to injunctive relief. A decree for reasonable costs is clearly the complementary remedy. Petitioners contend, however, that Section 10 is inapplicable to negligently sunken vessels. Pet. Br. pp. 26–27. Pointing to the fact that subsequent sections of the Act [15] expressly refer to sunken vessels, they urge that these sections are the only ones applicable and that any liability must be derived from them. And they rely on the Fourth Circuit's decision in *United States* v.

[15] Sections 15, 16, 19, 20, 33 U.S.C. 409, 411, 412, 414, 415.

Bethlehem Steel Co., 374 F. 2d 656, petition for certiorari pending, No. 130, October Term 1967, in which a divided court so held. We submit the approach taken by the Fourth Circuit in rigidly compartmentalizing the Act and confining the scope of the section will not withstand close scrutiny.

Judge Sobeloff's incisive analysis in dissent in *Bethlehem Steel* persuasively demonstrates that the scheme of the Act as a whole discloses no congressional intention to exclude sunken vessels from the class of obstructions proscribed by Section 10.[16] The mere fact that certain sections of the Act expressly treat the problem of sunken vessels does not require that result. A careful comparison of Section 10 with the portions of the sections dealing expressly with sunken vessels discloses that the other provi-

[16] The lower federal courts have split on the issue of whether the Section 10 prohibition is applicable to negilgently sunken vessels. In addition to the Fifth Circuit's decision in the case at bar, decisions of other courts expressly or by implication supporting the position that Section 10 is applicable are *United States* v. *Wilson*, 235 F. 2d 251 (C.A. 2); *United States* v. *Zubik*, 295 F. 2d 53 (C.A. 3); *United States* v. *Bethelem Steel Co.* (*The Texmar*), 319 F. 2d 512, 522, fn. 1 (C.A. 9) (dissenting opinion of Judge Browning). See also *United States* v. *Hall*, 63 Fed. 472 (C.A. 1); *United States* v. *New York Central R. Co.*, 252 F. Supp. 508 (D. Mass.), affirmed *per curiam*, 358 F. 2d 747 (C.A. 1). Decisions, expressly or by implication, supporting the position that Section 10 is inapplicable are *United States* v. *Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D. Conn.); *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D. Md.), affirmed on other grounds *sub nom. Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (C.A. 4); *The Manhattan*, 10 F. Supp. 45 (E.D. Pa.), affirmed, 85 F. 2d 427 (C.A. 3), certiorari denied *sub nom. United States* v. *The Bessemer*, 300 U.S. 654; *Loud* v. *United States*, 286 F. 2d 56 (C.A. 6); *United States* v. *Bethlehem Steel Co.* (*The Texmar*), 319 F. 2d 512 (C.A. 9).

sions were intended to "supplement" the general language of Section 10, rather than operate independently of it. The provisions specifically dealing with sunken vessels are but an "emphatic restatement" of the prohibition set forth in Section 10. To exclude negligently sunken vessels from the coverage of Section 10—which bans "any" obstruction—would be to give that provision "a narrow, cramped reading," at odds with the broad purpose of the Act. See *United States* v. *Republic Steel Corp., supra,* 362 U.S. at 491; *United States* v. *Standard Oil Co.,* 384 U.S. 224, 226.[17]

In sum, we submit that Judge Sobeloff's dissent in *Bethlehem Steel* persuasively reinforces the correctness of the decision by the Fifth Circuit below, holding Section 10 applicable to negligently sunken vessels. This construction is the only one that is in accord with the clearly expressed policy of the Act to keep waterways free of obstructions, and it echoes the spirit of the decisions of this Court vindicating that policy.

[17] There is certainly no warrant for distinguishing between intentionally and negligently sunken vessels—as the majority in *Bethlehem Steel* was apparently willing to do. Judge Sobeloff, dissenting in that case, was plainly correct in saying that the definition of "obstruction" used in Section 10 "cannot reasonably be thought to turn on whether a person acts deliberately or carelessly." 374 F. 2d at 671. As the Fifth Circuit observed here, defining an obstruction in terms of how it arose is inconsistent with the plain language of the section proscribing "any" obstruction.

B. PETITIONERS ARE PERSONALLY LIABLE UNDER SECTION 15 OF THE ACT FOR THE NEGLIGENT SINKING

Even if Section 10 reasonably could be construed as inapplicable to negligently sunken vessels, petitioners would still be liable *in personam* under Section 15 of the Act (33 U.S.C. 409), which deals expressly with sunken vessels.[18] Like Section 10, Section 15 sets forth an explicit prohibition which is designed to assure that navigable waters remain free of obstruction. In relevant part, it provides:

> It shall not be lawful to * * * voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels * * *.

As we view it, this prohibition against the careless or negligent sinking of a vessel is an "emphatic restatement," particularizing the Section 10 prohibition on "obstructions".

Petitioners do not dispute that the negligent sinking of their vessels violated the Section 15 prohibition. Nevertheless, they argue that they are exempt from *in personam* civil responsibility because the Act does not explicitly provide for it (Pet. Br. pp. 10–12). As with Section 10, there is no express statement of the civil consequences of negligently sinking a ship in violation of Section 15, but only a criminal sanction.[19]

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[18] See Note, 41 Tul. L. Rev. 459, 463–464 (1967), discussing the instant case.

[19] Section 16 of the Act, 33 U.S.C. 411 provides: "Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections * * * 409 [Section 15] of this title shall be guilty of a misdemeanor * * *."

Petitioners therefore contend that a violation of Section 15 subjects them solely to the criminal sanctions.

As we have seen, this same line of reasoning is advanced by petitioners as a defense to liability under Section 10. It has no greater merit when applied to Section 15. It requires no extended discussion to explain that this Court's teaching in *Republic Steel* applies equally to effectuating Section 15. The legal principles already discussed with respect to Section 10 permit civil remedies to be fashioned out of Section 15 so as to avoid imputing to Congress "a futility inconsistent with the great design of this legislation." *Republic Steel, supra,* 362 U.S. at 492. It is a corollary of equity that an indictable interference with navigability is also subject to injunction. *Mayor et al. of Georgetown* v. *Alexandria Canal Co.,* 37 U.S. 91, 97; *Attorney-General* v. *Terry,* L.R. 9 Ch. 423, 432 (Ch. App. 1874); *People* v. *Gold Run Ditch & Mining Co.,* 66 Cal. 138, 150, 4 Pac. 1152. Accordingly, it follows that there is liability under Section 15 for the removal of negligently sunken vessels or the cost of their removal. As stated by Judge Browning in his dissent in *The Texmar, supra,* 319 F. 2d at 523:

> [Section 15], like [Section 10], reflects the interest of the United States in the unobstructed navigability of its waters. Republic Steel holds that to protect this interest an injunctive remedy must be implied against those who create an unauthorized obstruction in violation of [Section 10]; therefore a like remedy is to be implied against those who voluntarily or carelessly sink vessels in navigable channels in violation of [Section 15]. Since the United States may by mandatory injunction impose the

> burden of removal upon one who sinks a ship in violation of [Section 15], the government should not be denied restitution if it is compelled to assume the costs of removal by the refusal of the wrongdoer to discharge his duty. * * *

See *Bethlehem Steel, supra,* (dissenting opinion).[20]

C. PETITIONERS CANNOT AVOID PERSONAL LIABILITY FOR THEIR NEGLIGENCE BY ABANDONING THE WRECK

Despite the fact that petitioners have violated the explicit prohibitions contained in Sections 10 and 15 of the Rivers and Harbors Act, they argue that they may immunize themselves from the *in personam* consequences of their unlawful negligence by the simple expedient of abandoning their vessels. This argument is based upon their contention (Pet. Br. pp. 17–21) that under the general maritime law an owner has a right to abandon his negligently sunken vessel and

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[20] In addition to the *Bethlehem* and *The Texmar* cases and the case at bar, the issue of whether a civil remedy could be implied from the prohibition of Section 15 has been expressly considered in *The Manhattan*, 10 F. Supp. 45 (E.D. Pa.), affirmed, 85 F. 2d 427 (C.A. 3), certiorari denied *sub nom. United States* v. *The Bessemer*, 300 U.S. 654; *United States* v. *Wilson*, 235 F. 2d 251 (C.A. 2); and *United States* v. *Zubik*, 295 F. 2d 53 (C.A. 3).

The Manhattan and *Wilson* were decided prior to *Republic Steel*, and the courts found no civil sanctions under Section 15. The authority of the *Wilson* decision has also been undermined by the Second Circuit's subsequent decision in *United States* v. *Perma Paving Co.*, 332 F. 2d 754, discussed supra, p. 16. In *Zubik* the court declined to make an analogy between Section 15 and this Court's holding in *Republic Steel* on the implementation of Section 10, and found no civil liability under Section 15. Compare *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D. Md.), affirmed *sub nom. Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (C.A. 4), holding that Section 15 permits abandonment of a vessel without liability only when the wreck occurs without fault.

thereby avoid personal liability. This right, it is further contended, not only was not altered by the Rivers and Harbors Act, but was expressly preserved by the Act (Pet. Br. p. 18).

At the outset, it is important to note that even if this argument rested on a solid foundation, it could not be relied on by those petitioners who were not the owners of the sunken vessels. Neither Section 10 nor Section 15 limits its ban on negligently causing obstructions or causing vessels to sink to the owners of the vessels involved. Anyone responsible for the result has engaged in unlawful conduct and is presumptively liable for removing the wreck or paying the costs of removal. But, as we now show, the general maritime law has never conferred a right even upon the owner of a negligently sunken vessel to escape personal liability by abandoning the vessel; the Limitation of Vessel Owner's Liability Act of 1851 precludes the avoidance of personal liability by negligent parties; and the Rivers and Harbors Act accords with that tradition by not exempting from personal liability persons who negligently sink vessels.

1. The general maritime law, as interpreted and applied by the American and English courts, establishes the right of an owner of a vessel which has been sunk *without fault on his part* to avoid *in personam* liability by abandoning his vessel. See *The City of Newark* v. *Mills,* 35 F. 2d 110 (C.A. 3), certiorari denied, 281 U.S. 722; *In re Highland Corp.,* 24 F. 2d 582 (S.D.N.Y.), affirmed, 29 F. 2d 37 (C.A. 2); *Wheeldon* v. *United States,* 184 F. Supp. 81 (N.D. Calif.); *Orrell* v. *Wilmington Iron Works,* 89 F. Supp. 418

(E.D.N.C.) reversed in part on other grounds and affirmed in part, 185 F. 2d 181 (C.A. 4); *In the Matter of the Petition of Boat Demand, Inc.*, 174 F. Supp 668 (D. Mass.); *Ball* v. *Berwind*, 29 Fed. 541 (E.D.N.Y.); *The Swan*, 23 Fed. Cas. 495 (No. 13667) (C.C. S.D.N.Y.); *Taylor* v. *Atlantic Mutual Ins. Co.*, 37 N.Y. 275; *The Ella*, [1915] P. 111; *The Crystal*, [1894] A.C. 508, [1891–1894] All E.R. 804 (H.L. 1894); *White* v. *Crisp*, 10 Ex. D. 312, 156 Eng. Rep. 463 (1854); *Brown* v. *Mallett*, 5 C.B. 599, 136 Eng. Rep. 1013 (Common Pleas 1848); *Hancock* v. *York, Newcastle & Berwick Ry.*, 10 C.B. 348 (1850). The courts have established this principle on the theory that the owner whose ship is sunk through no fault of his own has suffered enough injury by the loss of his vessel.[21] See *Gulf Coast Transp. Co.* v. *Ruddock-Orleans Cypress Co.*, 17 F. 2d 858 (E.D. La.); *Orrell* v. *Wilmington Iron Works*, *supra*, 89 F. Supp. at p. 424; *Hancock* v. *York, Newcastle & Berwick Ry.*, 10 C.B. 348 (1850). Such a benign policy, of course, does not apply where the sinking of a ship was due to the fault or negligence of the owner. Accordingly, where negligence is involved, as distinguished from unavoidable accident or natural calamity, the

[21] See Hughes, *Handbook of Admiralty Law*, § 142 (2d ed. 1920). The continuing validity of this theory may be questioned in light of present shipping practices which permit a vessel owner to obtain insurance not only to cover the value of the loss of his vessel but also the cost of removing a sunken vessel. For example, as noted above, p. 6, fn. 8 *supra*, the sunken barges involved in the *Cargill* action were covered by petitioner Continental Insurance Co. under a standard type Inland Protection and Indemnity form which included coverage for liability for removal or failure to remove the wrecked insured vessels.

general maritime law did not recognize a right in the owner to absolve himself of *in personam* liability by abandonment. As stated by the English Court of Appeal in a case which involved recovery of the costs of removing a negligently sunken vessel:

> At common law * * * the owners were liable for damage caused by their negligence—I say nothing at the moment about nuisance—and could not escape liability by saying they had abandoned the vessel. [*Dee Conservancy Board* v. *McConnell,* [1928] 2 K.B. 159, 163, [1928] All E.R. 554 (C.A.)] [22].

See *In the Matter of the Petition of Boat Demand, Inc.,* 174 F. Supp. 668 (D. Mass.); *In re Eastern Transp. Co.,* 102 F. Supp. 913 (D. Md.), affirmed *sub nom. Ottenheimer* v. *Whitaker,* 198 F. 2d 289 (C.A.

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[22] In *Dee*, the court held the conservators of a river and the owner of a wharf obstructed by an abandoned negligently sunken vessel could recover the costs of removal of the vessel *in personam* against the owner, based upon non-statutory liability, despite the existence of a statute purporting to govern liability for sunken vessels. The court found "the old common law liability remains where damage has been done by the negligence of the owner's servants." [1928] 2 K.B. at 164.

Petitioners, citing primarily English statutes which expressly impose *in personam* liability for the negligent sinking of vessels, contend that only by express statutory provision may such liability be created (Pet. Br. p. 35). This completely overlooks liability under non-statutory law which the *Dee* case demonstrates supplements the English statutory provisions, and which, as we show *infra* pp. 40–45, also supplements the ground for liability in this country under the Rivers and Harbors Act of 1899. The issue before this Court, therefore, is not merely whether it is proper to imply *in personam* liability under the Rivers and Harbors Act, but also whether the Act abolishes non-statutory liability. (Non-statutory liability is fully discussed in Part II of this brief.)

4); *Orrell* v. *Wilmington Iron Works, supra,* 89 F. Supp. at 421–423; *Boston & Hingham Steamboat Co.* v. *Munson,* 117 Mass. 34; *Taylor* v. *Atlantic Mutual Ins. Co.,* 37 N.Y. 275; *DeBardelebem Coal Co.* v. *Cox,* 16 Ala. App. 172, 76 So. 409, certiorari denied, 76 Ala. 553, 76 So. 911; *Hancock* v. *York, Newcastle & Berwick Ry.,* 10 C.B. 348 (1850); *Brown* v. *Mallett,* 5 C.B. 599, 617, 136 Eng. Rep. 1013 (Common Pleas 1848). See also *The Scotland,* 105 U.S. 24, 28–29.

The majority opinions in the *Bethlehem Steel* case, *supra,* in the Fourth Circuit, and *The Texmar* case, *supra,* in the Ninth Circuit, erroneously presume that maritime law sanctioned unrestricted abandonment as a method of escaping *in personam* liability, even though the ship was sunk due to the owner's negligence.[23] Both opinions apparently base their presumptions on *Winpenny & Chedester* v. *Philadelphia,* 65 Pa. 135, and *The Manhattan,* 10 F. Supp. 45 (E.D. Pa.), affirmed, 85 F. 2d 427 (C.A. 3), certiorari denied *sub nom. United States* v. *The Bessemer,* 300 U.S. 654. In *Winpenny* the court dismissed a suit for dam-

[23] See also Ray, *The Removal of Obstructions from Navigable Waters—Who Pays?,* 34 Ins. Couns. J. 28 (1967).

Petitioners (Pet. Br. pp. 20–21) and *amici curiae* (Am. Cur. Br. pp. 10–12) argue strenuously about the economic significance of continuing to recognize liability in such cases, where highly volatile cargoes are a common-place components of present day water commerce. Apart from the availability of insurance, illustrated by the *Cargill* action, policy considerations militate against expanding the avenues for avoiding liability. "The dangers of modern machines make it all the more necessary that negligence be discouraged." *Bisso* v. *Inland Waterways Ass'n,* 349 U.S. 85, 91.

ages against the City of Philadelphia brought by the owner of a vessel that had struck an abandoned vessel lying submerged in the Philadelphia harbor. Under a local law, the city was obligated to keep the harbor free from obstructions. In finding no liability, the court held the local law inapplicable, due to the type of obstruction plaintiff's ship had hit. In *dicta,* the court speculated as to where the submerged vessel sank and how it was washed into the harbor, and in the course of its discussion asserted that the owner of a sunken vessel was not liable for its removal regardless of the cause of the vessel's sinking. Significantly, the British cases cited by the court hold only that a ship-owner who was *not at fault* in the sinking is not liable for the ship's removal.[24] The district court in *The Manhattan,*[25] without extended discussion and also in *dictum,* expressed its approval of the views narrated in *Winpenny.*

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[24] For example, in *King* v. *Watts,* 2 Esp. 675, 676, 170 Eng. Rep. 493 (Assizes 1798), the court held that an indictment brought by the City of London for a nuisance—a sunken vessel in the River Thames—could not be maintained since the sinking "had been occasioned, not by any default or willful misconduct of the defendant, but by accident and misfortune; and that it would be adding to the calamity to subject the party to an indictment, for what had proceeded from such causes, against which he could not guard, or which he could not prevent." See also *Brown* v. *Mallett,* 5 C.B. 599, 136 Eng. Rep. 1013, 1021 (Common Pleas 1848) (the owner of a vessel sunk "without any fault of his" is not liable for its removal and therefore is not liable to a vessel that struck the wreck).

[25] *The Manhattan* involved removal of a vessel that sank through no fault of its own. See *The Manhattan,* 3 F. Supp. 75 (E.D. Pa.).

We submit that the *dicta* in these two cases do not accurately reflect the principles of maritime law and that they are contrary to the weight of considered authority explaining that only an owner who loses his vessel through no fault of his own may absolve himself of liability by abandoning his sunken vessel.[26]

2. The maritime principle that the owner of a vessel is liable for his negligence was carried over into statutory law by the Limitation of Vessel Owner's Liability Act of 1851. In 1851, Congress enacted "An Act to Limit a Vessel Owner's Liability," 9 Stat. 635, which as amended now appears at 46 U.S.C. 181, *et seq.* (pp. 59–60 *infra*). That Act, as originally enacted and as it exists today, provides that the liability of the owner of any vessel "for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture" is limited "to the interest of such owner in such vessel, and her freight then pending," but only "if done, occasioned, or incurred *without the privity or knowledge of such owner*" (emphasis added).[27] The vessel owner's right to limit his liabil-

[26] Petitioners quote language of Judge Manton in *Petition of Highlands Navigation Corp.*, 29 F. 2d 37 (C.A. 2), in support of their contention that the general maritime law permits the avoidance of liability by the abandonment of a negligently sunken vessel (Pet. Br. p. 19). Reliance on this case is misplaced, however, as it involved a vessel which the court noted burned and sank without negligence. See also the opinion of the trial court, 24 F. 2d 582 (S.D.N.Y.).

[27] The Act was passed by Congress to promote the growth of the nation's shipping industry by encouraging investment in ships through the limitation of liability. Prior to the passage of this Act, the general maritime law as applied by American as well as English courts, in cases involving situations other than the abandonment of ships sunk without fault, recognized

ity for damage done by his vessel was thus made to depend upon his lack of "privity or knowledge" of the cause of the loss; *i.e.*, in the words of Chief Justice Hughes in *American Car & Foundry Co.* v. *Brassert*, 289 U.S. 261, 264, "[f]or his fault, neglect and contracts the owner remains liable." [28] Accordingly, in cases involving damages caused by a sunken vessel, the courts have permitted an owner to abandon his vessel and limit his liability to the value of the vessel and the freight due only where the circumstances demonstrate no such "fault" or "neglect" of the owner. See *The City of Newark* v. *Mills*, 35 F. 2d 110 (C.A. 3), certiorari denied, 281 U.S. 722; *The City of Bangor*, 13 F.

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no general limitation of liability and thus the owner was held liable *in personam* for damages caused by negligence although the owner himself was without privity or knowledge of the negligence. See *The Scotland*, 105 U.S. 24, 28; *Stinson* v. *Wyman*, 23 Fed. Cas. 108, 109 (No. 13,460) (D. Me.); *Walker* v. *Boston Hope Ins. Co.*, 80 Mass. 288, 297; Marsden, *Collisions at Sea*, 172–173 (London, 10th ed.). See also *Norwich Co.* v. *Wright*, 13 Wall. 104.

[28] Under the "statutory duty" restriction on the availability of limitation of liability, an owner cannot avail himself of the protections of the Act to escape the consequences of his breach of a statutory duty. See Gilmore & Black, *The Law of Admiralty* § 10–13, at 679 (1957). In *The Snug Harbor*, 53 F. 2d 407, 410–411 (E.D.N.Y.), affirmed *sub nom. United States* v. *Eastern Transp. Co.*, 59 F. 2d 984 (C.A. 2), the court refused to permit the owner of a sunken vessel (the government) to limit its liability, because of its violation of Section 15 of the Rivers and Harbors Act of 1899. And the House of Lords not long ago decided that whether or not an owner may rely on the English equivalent of the Limitation Act to escape his common law liability for the cost of raising his negligently sunken ship, there is no question but that limitation is not permitted when the claim for costs is premised on the statutory liability for negligently creating an obstruction. See *The Stonedale No. 1*, [1955] 2 All E.R. 689, 693 (H.L.).

Supp. 648 (D. Mass); *In re Highland Corp.*, 24 F. 2d 582 (S.D.N.Y.), affirmed, 29 F. 2d 37 (C.A. 2); *Hagan* v. *City of Richmond*, 254 Va. 723, 52 S.E. 385. See, also, *The Irving F. Ross*, 8 F. 2d 313 (D. Mass.).[29]

In this light, it becomes clear that under both the general maritime law and the Limitations Act of 1851 an owner cannot escape *in personam* liability for his negligence by abandoning his vessel.[30] As we now show, the Rivers and Harbors Act of 1899 did not change this rule.

3. The first sentence of Section 15 of the Rivers and Harbors Act, as previously noted, makes it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." The second and final sentence of Section 15 then provides:

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[29] The owner bears the burden of proving lack of privity or knowledge. See *Coryell* v. *Phipps*, 317 U.S. 406, 409–410; cf. *The Pennsylvania*, 19 Wall. 125, 136.

[30] In cases involving corporate vessel owners, the rule is that "liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred". *Coryell* v. *Phipps*, 317 U.S. 406, citing *Spenser Kellog & Sons* v. *Hicks*, 285 U.S. 502; see *Craig* v. *Continental Ins Co.*, 141 U.S. 638, 646–47.

A general discussion of the "without the privity or knowledge" condition of limiting liability is found in Gilmore & Black, *Law of Admiralty* §§ 10–20 to 10–25 (1957). The specific acts of negligence alleged in the libels (R. 17, 26–28) are of the type that are imputable to the owner as establishing "privity or knowledge."

Of course the Limitation of Liability Act would in no event be available to immunize those petitioners who were not owners or charterers of the sunken vessels. See 46 U.S.C. 186.

> And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abondonment of such craft, and subject the same to removal by the United States as provided for in sections 411–416, 418, and 502 of this title.

This section is supplemented by Section 19, 33 U.S.C. 414 (set forth pp. 57–58 *infra*), which provides that when a sunken vessel obstructs navigation "and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time," the sunken vessel may be removed and sold by the Secretary of the Army at his discretion and the proceeds paid into the Treasury of the United States.[31]

Petitioners claim that these sections "preserved" (Pet. Br. p. 18) a pre-existing right to avoid liability by abandonment. We have seen, however, that the

[31] In an emergency, Section 20, 33 U.S.C. 415 (set forth, pp. 58–59 *infra*), permits the Secretary to remove a wreck summarily, the cost of the removal becoming a lien on the vessel and the owner ultimately being required to pay the cost of removal or forfeit his interest in the wreck.

general maritime law recognized no such right where the owner had been negligent. The question then arises whether these sections were intended to create such a right to avoid *in personam* liability. The answer must be in the negative. The legislative background of the Act, its text, and its purpose, demonstrate that no such right is created; rather, liability for negligence was continued in accordance with the general maritime law and the Limitations Act.

a. A review of the development of the provisions of 1899 Act will help furnish perspective. Congress first manifested its concern with the problem of sunken vessels obstructing the navigability of inland waterways in Section 4 of the Rivers and Harbors Act of June 14, 1880, 21 Stat. 180, 197.[32] That section

[32] That section provides:

"Whenever hereafter the navigation of any river, lake, harbor, or bay, or other navigable water of the United States, shall be obstructed or endangered by any sunken vessel or water-craft, it shall be the duty of the Secretary of War, upon satisfactory information thereof, to cause reasonable notice, of not less than thirty days, to be given, personally or by publication, at least once a week in the newspaper published nearest the locality of such sunken vessel or craft, to all persons interested in such vessel or craft, or in the cargo thereof, of the purpose of said Secretary, unless such vessel or craft shall be removed as soon thereafter as practicable by the parties interested therein, to cause the same to be removed. If such sunken vessel or craft and cargo shall not be removed by the parties interested therein as soon as practicable after the date of the giving of such notice, by publication, or after such personal service of notice, as the case may be, such sunken vessel or craft shall be treated as abandoned and derelict, and the Secretary of War shall proceed to remove the same. Such sunken vessel or craft and cargo and all property therein when so removed shall, after reasonable notice of the time and place of sale, be sold to the highest bidder or bidders for cash, and the proceeds of such sales shall

provided that when a sunken vessel obstructed a navigable body of water, the Secretary of War was required to give reasonable notice to all persons interested in the sunken vessel or its cargo that he intended to cause its removal. If the sunken vessel and its cargo were not removed "as soon as practicable" after the date of notice, the statute declared, "such sunken vessel or craft shall be treated as abandoned and derelict, and the Secretary of War shall proceed to remove the same." Although formal legislative history of this Section is barren,[33] the congressional intent in enacting it is, we believe, apparent. In terms, Section 4 conferred upon the Secretary of War the right to treat a wreck as "abandoned and derelict" so as to enable him to remove it if its owner failed to do so. The section was not concerned with conferring upon the vessel owner any right to avoid liability by abandoning his vessel. In this legislation Congress did not purport to alter traditional maritime responsibilities or revamp the rule of the 1851 Limitation Act that the owner of a sunken vessel could limit his liability to his interest in the vessel

be deposited in the Treasury of the United States to the credit of a fund for the removal of such obstructions to navigation, under the direction of the Secretary of War, and to be paid out for that purpose on his requisition therefor. * * *"

[33] As with most legislation relating to obstructions to navigation, Section 4 was tacked on to an appropriations bill for river and harbor improvement and construction. Accordingly, this provision is not dealt with in the congressional debates of the bill. And, since the requirement of a committee report was suspended with respect to this bill (see 10 Cong. Rec., Pt. 4, 3437 (1880)), we do not have the benefit of the House committee's views on this bill or the particular section.

only if the sinking occurred "without the privity or knowledge of such owner." To the contrary, Congress was concerned only with establishing the right and immunity of the Secretary of War to remove a sunken vessel without incurring liability to its owner, and it accomplished this purpose by permitting him to treat the vessel as "abandoned and derelict," leaving the question of the right of vessel owner to limit his liability to the Limitation of Liability Act.

In 1882, Congress "enlarged" the power granted the Secretary of War in Section 4 of the 1880 Act by authorizing him to sell a sunken vessel before it was raised or removed. Rivers and Harbors Act of 1882, 22 Stat. 191, 208–209.[34] Then, in 1890, without repealing either the 1880 or 1882 provisions, Congress provided in Section 8 of the River and Harbor Act of that year (26 Stat. 426, 454):

> That all wrecks of vessels and other obstructions to the navigation of any port, roadstead, harbor, or navigable river, or other navigable waters of the United States, which may have been permitted by the owners thereof or the parties by whom they were caused to remain to

[34] That provision stated: "[T]he power and authority granted to the Secretary of War under and by virtue of section four of the act of Congress approved June fourteenth, eighteen hundred and eighty, relating to wrecks and sunken vessels be, and the same are hereby, enlarged so the Secretary of War may, in his discretion, sell and dispose of any such sunken craft, vessel, or cargo, or property therein, before the raising or removal thereof, according to the same regulations that are in the said act prescribed for the sale of the same after the removal thereof; and all laws and parts of laws inconsistent herewith are hereby repealed."

> the injury of commerce and navigation for a longer period than two months, shall be subject to be broken up and removed by the Secretary of War, without liability for damage to the owners of the same.

In both the 1882 and 1890 Acts—as was the case with the 1880 Act—Congress ignored the possible liability of the vessel owner, leaving that question to the Limitation of Liability Act. Again, the congressional purpose was merely to devise an expedient method of enabling the Secretary of War to remove wrecked vessels without exposing the government to claims for damages brought by the owner of the wrecked vessel.

Finally, in 1899 Congres enacted the legislation with which we are now concerned. As already noted (pp. 12–13 *supra*), this Act made "no essential changes in the existing law," being only a "codification of existing laws pertaining to rivers and harbors." 32 Cong. Rec., Pt. 3, 2923 (1899). Congress eschewed any intention to work substantive alterations in the maritime law, and could not, therefore, have intended that the Act enlarge the rights of vessel owners. Accordingly, when Section 15 of the Rivers and Harbors Act of 1899 declared that "* * * it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States * * *," it was not conferring a novel absolute *right* of abandonment upon the vessel owner. Instead, Congress left unchanged the principle of general maritime law and

the Limitations Act that only a vessel owner who is not at fault may absolve himself of *in personam* liability by abandoning his vessel.

b. The language employed in the provisions dealing with abandonment suggests that Congress was concerned solely with the question of the liability of the Secretary of War for the removal of vessels, rather than the limitation of liability of vessel owners. The provisions only "regulate the relationship between the Secretary and the owner of a wreck," *The Texmar, supra,* 319 F. 2d at 524 (Browning, J., dissenting),[35] and result in the "creation of a right in favor of the United States" and "not the grant of a personal immunity to the shipowner" *Bethlehem Steel, supra,* 374 F. 2d at 671 (Sobeloff, J., dissenting). Accordingly, only the government—not vessel owners—may invoke these provisions as a defense to liability. See *The Port Hunter,* 6 F. Supp. 1009 (D. Mass.); *Gulf Coast Transp. Co. v. Ruddock-Orleans Cypress Co.,* 17 F. 2d 858 (E.D. La.).

Moreover, specific provisions of the Rivers and Harbors Act do strongly indicate that Congress contemplated liability for those responsible for the negligent sinking of vessels. Section 15 of the Act, declaring it unlawful to "voluntarily or carelessly" sink a

[35] The majority opinion (per Judge Madden of the Court of Claims sitting by designation; Circuit Judge Duniway wrote a separate concurring opinion), expressed the belief that the Rivers and Harbors Act permitted a negligent vessel owner to abandon with impunity. As Judge Browning noted in his dissent, 319 F. 2d at 525, fn. 11, the cases relied upon by the majority and catalogued by petitioners and *amici curiae* either involved non-negligent vessel owners or never reached the issue of limitation of liability due to abandonment.

vessel, groups the negligent with the willful. This juxtapositioning militates against different treatment with respect to personal liability. *Bethlehem Steel, supra,* 374 F. 2d at 670 (dissenting opinion). Since it was settled by *United States* v. *Hall, supra,* prior to the 1899 compilation, that one who willfully sinks a vessel is subject to *in personam* liability, the statutory grouping indicates that the same liability follows for carelessly sinking a vessel. In addition, the first sentence of Section 15 explicitly proscribes the voluntary or careless sinking of vessels in a navigable channel. Construing the reference to abandonment in the next sentence as absolving such owners of liability would make the provisions of Section 15 inconsistent with each other, for this construction would in effect permit vessel owners to violate the first sentence's clear prohibition with impunity. Avoidance of such a contradiction is further reason why the Act should be read as allowing only the owner of a vessel that sinks without fault to avoid liability by abandonment.[36] See *In re Eastern Transp. Co.,* 102 F. Supp.

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[36] As noted by the Fifth Circuit (R. 162), the mere fact that Congress appropriates funds for removing sunken vessels obstructing navigation, pursuant to 31 U.S.C. 725a(b)(14), does not indicate that Congress believes the government is required to bear the final costs of removing negligently sunken vessels. The government may use such funds to salvage vessels whose owners are unknown, or insolvent, or to salvage vessels which are sunk other than "voluntarily or carelessly". Furthermore, as the WYCHEM action illustrates, where the government decides not to delay in removing a wreck, public funds must be expended long before the costs can be recovered from those ultimately liable.

Similarly, the mere fact that in the 19th century Congress from time to time enacted appropriation bills to raise specified

913 (D. Md.), affirmed *sub nom. Ottenheimer* v. *Whitaker,* 198 F. 2d 289 (C.A. 4); *In the Matter of the Petition of Boat Demand, Inc.,* 174 F. Supp. 668 (D. Mass.); *Hagan* v. *City of Richmond,* 104 Va. 723, 734, 52 S.E. 385.

c. The Rivers and Harbors Act was enacted to keep the nation's navigable waters free from obstructions. Construing the provisions dealing with abandonment as creating an unqualified right of abandonment in negligent vessel owners is scarcely conducive to this end. Such a construction would impute to Congress an intention "inconsistent with the great design of this legislation." *Republic Steel, supra,* 362 U.S. at 492. In addition, it would create a conflict with the explicit policy expressed by Congress in the Limitations Act.[37] Nothing in the history or text of the congres-

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wrecks does not indicate that Congress believed the government was required to bear the costs of removal of negligently sunken vessels. These appropriation bills, cited in petitioners' brief, pp. 8–9, may have covered the raising of wrecks sunk without fault. Or Congress might have decided to relieve a ship owner of liability in a particular instance.

[37] The petitioners argue (Pet. Br. p. 20) that it has been the policy of Congress to encourage water-borne commerce and that placing the burden of the cost of removal of negligently sunken vessels upon the government is part of that policy. Therefore, it is their position, even though the burden of imposing liability upon operators of vessels may be eased by insurance coverage to pay removal costs, see p. 6, fn. 8, and p. 23, fn. 21, *supra,* that operators of vessels, unlike operators of all other common carriers, are immune from personal liability for damage caused by their negligence. As Judge Sobeloff noted in his dissent in *Bethlehem Steel, supra,* 374 F. 2d at 672: "I have no quarrel * * * that the Government has long followed policies

sional plan permits this result.[38]

d. Permitting the imposition of *in personam* liability on negligent vessel owners not only harmonizes all the provisions of the Act, and promotes its purposes, but is the only interpretation that is consistent with that given the Act by the Secretary of War within two years after the passage of the statute. In 1901, the Secretary of War, charged with the duty of administering the relevant portions of the Act, was asked where the burden lay for the removal of a

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of encouragement and support of water-borne commerce and has been generous in the provision of subsidies in various forms. But nowhere has Congress manifested such unrestrained benevolence towards owners so as to warrant the implication of immunity from responsibility for the negligent sinking of vessels. It is an unwarranted extension of these policies for courts to dilute the clear congressional condemnation in section [15] of carelessness causing obstructions to navigation and the equally clear command to remove. * * *"

[38] In 1964, the House Committee on Government Operations issued H. Rep. No. 1633, 88th Cong., 2d Sess., entitled *Reimbursement of Government Expenditures for Removal of Hazardous Substances.* The report noted (p. 5) the conflicting lower court decisions on the government's right to reimbursement under the Rivers and Harbors Act and concluded that Government efforts to obtain reimbursement were being hampered by "ambiguity or deficiency" in the provisions of the Act. (p. 4). Accordingly, the committee proposed legislation to "define" the Government's rights so as to clearly permit reimbursement (p. 5). To date, no legislation has been enacted amending the Act. The proposing of clarifying legislation and the nonaction of Congress on that legislation, of course, constitute scant evidence as to the proper construction of an Act. See *American Trucking Ass'ns* v. *Atchison T. & S. F. Ry.*, 387 U.S. 397, 416–418; *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 610; *Helvering* v. *Hallock*, 309 U.S. 106, 120. See also *United States* v. *DuPont & Co.*, 353 U.S. 586, 590.

The draft bills would define liability in accordance with the principles the government is urging before this Court.

sunken vessel. He replied: "It is believed the vessel constitutes an obstruction caused by the voluntary or careless acts of those owning or controlling the boat and that the burden of removal rests upon them" (R. 100–101). This early administrative interpretation was carried over into a formal administrative regulation published in 1946. 11 Fed. Reg. 177, A–828. The regulation now provides:

> * * * a person who willfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or pay for its removal. [33 C.F.R. 209.410] [Reprinted fully, p. 60, *infra*].

This long-standing administrative construction,[39] while not conclusive, is entitled to great weight. *United States* v. *Republic Steel,* 362 U.S. 482, 490, note 5;

[39] Petitioners claim (Pet. Br. p. 16) that the administrative construction of the statute by the Department of the Army has not been consistent, citing a superseded Department of Army pamphlet, 27–164, "Military Reservations and Navigable Waters" (July 1961), pp. 181–82. The writer of the pamphlet, without referring to the above quoted regulation, stated that he believed that a claim for reimbursement for removal of a vessel may not be asserted against the owner of a vessel. The preface to the pamphlet notes that the views expressed therein "represent the opinion" of the writer and do "not purport to promulgate Department of Army policy". Thus the statement relied on by petitioners can in no way be viewed as a modification of the Army's long standing official policy as embodied in its regulation.

Cf. *Udall* v. *Tallman*, 380 U.S. 1, 16; *Federal Housing Administration* v. *The Darlington, Inc.* 358 U.S. 84.

In sum, the Rivers and Harbors Act makes the owner-petitioners liable *in personam* for the removal or cost of removal of vessels sunk due to their negligence, and they cannot avoid this statutory liability by abandoning their vessels. The liability of those petitioners who were not owners, but whose negligence also precipitated the sinkings, is unquestionable.

II. APART FROM STATUTORY LAW THOSE RESPONSIBLE FOR THE NEGLIGENT SINKING OF A VESSEL IN NAVIGABLE WATERS ARE REQUIRED TO REMOVE THE VESSEL OR PAY THE COST OF REMOVAL

For the reasons outlined in Point I above, we submit that the court below correctly concluded that the remedies sought by the government are readily inferable from the Rivers and Harbors Act. While we believe this Court need go no further, we now show that there is an additional independent ground for affirmance of the judgment of the court of appeals. Under the non-statutory law, not displaced or preempted by the Rivers and Harbors Act, the government has a right to compel those whose negligence causes a vessel to sink in navigable waters to remove the vessel or pay the cost of removal.

A. THE RIVERS AND HARBORS ACT DOES NOT PREEMPT NON-STATUTORY GROUNDS OF LIABILITY

Nothing in the Rivers and Harbors Act, or in any of the predecessor legislation, indicates that Congress intended that the statutory scheme should constitute the sole corpus of law governing the rights and duties

arising from the use of inland waterways. The 1899 Act was the result of a direction to the Secretary of War to compile all the "general laws that have been enacted from time to time *by Congress* for the maintenance, protection, and preservation of the navigable waters of the United States * * *." H. Doc. No. 293, 54th Cong., 2d Sess. (1897). (Emphasis added.) As we have already noted, this Act was not intended to alter the substance of pre-existing law, but was designed merely to organize and collate the legislative pronouncements in this area. Furthermore, the prime focus of the development of the rivers and harbors statutes was to assert the federal interest in the navigable waters and to clarify some of the relations between the government and the users of these waters. There was certainly no hint that anything was being done to constrict or replace the existing responsibilities of persons engaged in water-borne commerce, except insofar as inconsistent with the legislative judgments.[40]

The English experience is illustrative. In 1847 Parliament passed the Harbours, Docks, and Piers Clauses Act, 32 & 33 Vict. ch. c., § 96, authorizing harbourmasters to remove wrecks and recover the costs of removal from the owner. Yet, in a variety of contexts, English

[40] Directing the abatement of an obstruction to the navigability of New York harbor, the New York Court of Appeals explained: "A statutory remedy never takes away a previous remedy at common law, unless such an intention is disclosed, but is always held to be cumulative merely." *People* v. *Vanderbilt*, 26 N.Y. 287, 294–295.

courts have ruled that this act, and the special local acts that conform to it, did not replace the common law prohibition on wilfully or negligently obstructing harbors or rivers [41] or preclude resort to ancient non-statutory remedies. This survival of non-statutory rights and liabilities was implicit in *The Crystal,* [1894] A.C. 508, 516, [1891–1894] All E.R. 804 (H.L.), and was made the express holding of the Court of Appeal in *Dee Conservancy Board* v. *McConnell,* [1928] 2 K.B. 159, 163–66, [1928] All E.R. 554 (Ct. Appl.), where the court ruled that, irrespective of the impact of the statute, the negligent sinking of a vessel in a waterway continued to be a tort at common law and the ensuing liability could not be retroactively purged by abandoning the vessel. That both statutory and non-statutory grounds for liability exist side by side is well recognized now in England. See *The Stonedale No. 1,* [1955] 2 All E.R. 689, 693 (H.L.); *The Liverpool (No. 2),* [1960] 3 All E.R. 307, 311 (Ct. Appl.).

We submit that the same harmonious co-existence between these two sources of law should be recognized in the United States also. The Rivers and Harbors Act of 1899, as read by this Court in *Republic Steel, supra,* 362 U.S. at 486, was not an exhaustive definition of rights and remedies, but was a compilation of legislative pronouncements on the interests of the United States in the navigable waters. The Act made "no essential changes in the existing law". *Ibid.* It

[41] See Wisdom, *Obstructions In Rivers,* 119 Just. P. 846 (1955); Desty, *A Manual of the Law Relating to Shipping and Admiralty* § 392 (1879).

did not, we submit, repeal or supersede the non-statutory rights asserted here, but rather left them intact.[42]

Contrary to petitioners' assertion (Pet. Br. p. 37), the decision of this Court in *Willamette Iron Bridge Co.* v. *Hatch,* 125 U.S. 1, does not hold that there are no federal non-statutory rights that the government may assert nor does it preclude the United States from invoking non-statutory relief. The *Willamette* case involved the erection of a bridge across the Willamette River and the issue was whether the construction could be enjoined by a bill in equity in a federal court as a violation of the Act of Congress admitting Oregon to the Union. In considering whether, if that act could not apply to the construction of the bridge, the case was one arising under the Constitution or laws of the United States so as to confer jurisdiction on a federal court sitting in equity in a non-diversity case, it was stated, 125 U.S. at 8:

> The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. *But until it does pass some such law,* there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, *unless it be the maritime law, administered by the courts of admiralty and marine jurisdiction.* No precedent,

[42] In fact, the form of repealer inserted into the 1899 Act (see 30 Stat. 1155) was of the nineteenth-century style which did not repeal by implication, but left intact existing consistent laws. See *Henderson's Tobacco,* 11 Wall. 652, 656.

> however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide,) it would not avail to sustain the bill in equity filed in the original case. [Emphasis added.]

Immediately after the decision—and as a direct result of it—Congress extended the interest of the United States to all its navigable waters by enacting the Rivers and Harbors Act of 1890, 26 Stat. 426, 454.[43] See, also, *In re Debs*, 158 U.S. 564, 586. When Congress, by the 1890 Act, extended the regulatory interest of the United States to include all navigable waters, the traditional rights of the sovereign attached, and the principles of maritime law were "federalized" and made the subject of application and development by the federal courts. Moreover, as was expressly noted in *Willamette*, the rationale was concerned solely with the relief a federal court of equity could grant, since the issue of what relief could be granted by a federal court sitting in admiralty and applying principles of maritime law was not before the court. A further factor making inapplicable the Court's finding in *Willamette* that relief was unavailable is the existence of proprietary rights of the United States arising out of improvements to the Mississippi River. The *Willamette* decision made clear that had

[43] That statute is the predecessor of the present statute enacted in 1899 and was introduced in Congress by Senator Dolph who had represented the defeated party in the *Willamette Bridge* case. The debates show that the Act was intended to remedy the result of that decision. 21 Cong. Rec., Pt. 9, pp. 8604–8605 (1890). As this Court remarked in *Republic Steel*, *supra*, 362 U.S. at 488, the legislation was intended "to fill the gap created by *Willamette* * * *."

there been "any interference with the operations, constructions, or improvements made by the general government" a federal equity court would have been able to grant relief to remove the obstruction causing the interference. 125 U.S. at 13–14. Thus, *Willamette* in no way undercuts the existence of a body of non-statutory federal law or precludes the United States from resorting to this distinct source of rights to protect its regulatory and proprietary interests (see R. 21).

The remaining inquiry, then, is to ascertain the nature of the non-statutory rights on which the government may rely.

B. PETITIONERS' NEGLIGENCE CREATED PUBLIC NUISANCES WHICH THEY MUST ABATE OR PAY THE COST OF ABATING.

At common law, the creation of an obstruction in a public highway, including a navigable river,[44] was deemed a public nuisance. *Mayor et al. of Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, 97; see Prosser, *Torts*, 401–402 (2d ed. 1955); Comment, *Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case*, 59 Colum. L. Rev. 1065, 1067 (1959). This principle applies when the obstruction in the river is a vessel, unlawfully moored or sunk. See *F. S. Royster Guano Co.* v. *Outten*, 226 Fed. 484, 486 (C.A. 4); *Carver* v. *San Pedro, L. A., & S.L.R.*, 151 Fed. 334 (C.C.S.D. Calif.); *The Ella*, [1915] P. 111; *King* v. *Ward*, 6 Ad. & El. 384 (K.B. 1836); *Rose* v. *Miles*, 4 Miles & Selwyn 101 (K.B.

[44] See 33 U.S.C. 10: "All the navigable rivers * * * in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

1815); 4 Shearmen & Redfield, *Negligence,* p. 1866 (rev. ed 1941). See also *United States* v. *Hall,* 63 Fed. 472, 474 (C.A. 1); *Boston & Hingham Steamboat Co.* v. *Munson,* 117 Mass. 34; *Miller* v. *Chatterton,* 46 Minn. 338, 48 N.W. 1109; *King* v. *Russell,* 9 D & R 566 (K.B. 1827); *King* v. *Watts,* 2 Esp. 675, 170 Eng. Rep. 493 (Assizes, 1798).

From the earliest times, courts have exercised injunctive powers to compel those responsible for creating a nuisance by obstructing a navigable river to abate the nuisance and remove the obstruction. See, *e.g., Mayor et al. of Georgetown* v. *Alexandria Canal Co.,* 12 Pet. 91, 97; *People* v. *Gold Run Ditch & Mining Co.,* 66 Cal. 138, 150, 4 Pac. 1152; *Vielbahn* v. *Board of County Comm'rs,* 96 Minn. 276, 104 N.W. 1089; *Attorney-General* v. *Earl of Lonsdale,* 20 L.T. 64, 67 (V.C. 1868); *Attorney-General* v. *Terry,* L.R. 9 Ch. 423, 432 (Ch. App. 1874); *Attorney-General* v. *Parmeter,* 10 Price 378, 410–411 (Ex. 1811), affirmed *sub nom. Parmeter* v. *Gibbs,* 10 Price 412 (H.L. 1813); 2 Story, *Equity Jurisprudence* § 1248 (14th ed. 1918). Generally, a person suffering specific damage because of a public nuisance may abate the nuisance himself and recover the costs. See, *e.g., City of Harrisonville* v. *W. S. Dickey Clay Mfg. Co.,* 61 F. 2d 210, 213 (C.A. 8), reversed on other grounds, 289 U.S. 334; *City of Concord* v. *Burlegih,* 67 N.H. 106, 36 Atl. 606; *State of Texas* v. *Goodnight,* 70 Tex. 682, 11 S.W. 119; *Barclay* v. *Commonwealth,* 25 Pa. 503; 3 Sedgwick, *Damages,* p. 1958 (9th ed). See, also, *Restatement of*

Restitution § 115 (1937 ed.). Thus, an owner of a negligently sunken vessel can be compelled to abate the nuisance so created or to pay the cost of removal of the vessel by others. As stated by the English admiralty court in *The Ella,* [1915] P. 111, 121:

> Moreover, by the fault of the defendants or their servants, a public nuisance was created by the obstruction of the channel, and the expenditure of money by the harbor authority in abating the nuisance, whether pursuant to a right, or in performance of an obligation, constituted special damage [citation omitted].
>
> Accordingly, I am of the opinion that the defendants are liable to make good to the plaintiffs the expenses incurred by them in buoying, lighting, marking, and subsequently removing the wreck by blowing it up, whether the case is regarded from the point of view of the breach of duty or negligence of the defendants, or from that of a public nuisance caused through their fault. * * * [45]

[45] Besides creating an abatable nuisance, negligence resulting in the sinking of a vessel also constitutes a maritime tort. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 3 Wall. 20, 36; see *The Liverpool (No. 2)*, [1960] 3 All E.R. 307, 311 (Ct. Appl.). The instant libels thus also sounded in tort (See R. 12–13, 17, 20–21, 26–28). Cf. *Miller* v. *Chatterton*, 46 Minn. 338, 48 N.W. 1109 (1891); *Rose* v. *Miles*, 4 Miles & Selwyn 101 (K.B. 1815); compare *In the Matter of the Petition of Boat Demand, Inc.*, 174 F. Supp. 668 (D. Mass.); *Piscataqua Navigco Co.* v. *New York, N.H. & H.R.*, 89 Fed. 362 (D. Mass.); *Boston* v. *Hingham Steamboat Co.* v. *Munson*, 117 Mass. 34; *People* v. *Gold Run Ditch Mining Co.*, 66 Cal. 138, 147, 4 Pac. 1152.

C. THE UNITED STATES IS ENTITLED TO COMPEL ABATEMENT OF A NUISANCE IN NAVIGABLE WATERS OR TO RECOVER THE COSTS OF ABATEMENT

Because of its interest in navigable rivers, the United States is entitled to invoke the body of non-statutory law outlined above to compel abatement of the nuisances created by petitioners, or recover the reasonable costs of abating the nuisances itself. The United States has a twofold interest in the Mississippi River, regulatory and proprietary.[46] Since it has long been settled that in any area in which the United States has a regulatory or proprietary interest, it has the concomitant right to protect and maintain that interest, the United States has the inherent non-statutory right to compel the abatement of the nuisances created by petitioners or to recover the costs of abating it. See *Cotton* v. *United States*, 11 How. 228; *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273; *In re Debs*, 158 U.S. 564. See, also, *Sanitary District* v. *United States*, 266 U.S. 405, 425–426; *United States* v. *Republic Steel*, *supra*.

The regulatory interest of the United States arises primarily from the power conferred upon it by Article I, Section 8, of the Constitution "To regulate Commerce with foreign Nations, and among the several States." Pursuant to this authority, the United States has engaged in extensive regulation of navigation on the rivers of the nation (see, *e.g.*, Title 33 of the United States Code) and has acquired and as-

[46] Also involved is the interest of the United States in protecting the health and welfare of its citizens against the perils of the 2,220,000 pounds of chlorine gas. Cf. *In re Debs*, 158 U.S. 564, 584.

serted an interest in keeping navigable waters free of obstructions. This interest is sufficient to permit the Attorney General "by virtue of his office" to bring a suit to enjoin and remove an obstruction and "no statute is necessary to authorize the suit." *Sanitary District* v. *United States, supra,* 266 U.S. at 426; *Republic Steel, supra,* 362 U.S. at 492; *Coosaw Mining Co.* v. *South Carolina,* 144 U.S. 550, 566; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 518, 563; see *United States v. Hall, supra,* 63 Fed. at 473–474; *North Bloomfield Gravel Mining Co.* v. *United States, supra,* 88 Fed. at 677–678; cf. *In re Debs, supra,* 158 U.S. at 586; compare *The Ella,* [1915] P. 111; *Attorney-General* v. *Johnson,* 2 Wils. Ch. 87, 37 Eng. Rep. 240 (Ch. 1819). As this Court stated in *United States* v. *San Jacinto Tin Co., supra,* 125 U.S. at 279, even absent specific statutory authority, the Attorney General may institute a suit to assert the interests of the United States, since he "is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government."

Similarly, the United States through the Attorney General may assert its right and duty to protect its proprietary interest in the nation's waterways. The navigable waters are the "property of the nation" in the charge of the United States government. *In re Debs, supra,* 158 U.S. at 586, quoting *Gilman* v. *Philadelphia,* 3 Wall. 713, 724; see, also, *Sanitary District* v. *United States, supra,* 266 U.S. 425. Any injury to the navigable capacity of the waters is an

"injury to property rights". *North Bloomfield Gravel Mining Co.* v. *United States, supra,* 88 Fed. at 677. Moreover, the United States has a proprietary interest in the Mississippi River due to the expenditures of monies for various river improvements. As the libel in the WYCHEM case alleges, the United States has made substantial improvements to the Mississippi to improve navigation, to prevent floods and to promote and facilitate commerce, trade and the postal service (R. 21). "The exact amount of federal property on the banks and levees in articulated mats, revetments, dikes, works, structures, buoys, beacons, lights, landings, vessels, on the part of the river within thirty miles of this chlorine and downriver from its then location is incalculable but substantial in nature."[47] (R. 21). To protect these improvements, the United States may invoke its non-statutory rights and seek relief through the courts. See, *e.g., United States* v. *Duluth,* 25 Fed. Cas. 923 (No. 15,001) (C.C. D. Minn.) (Miller, Circuit Justice); *United States* v. *North Bloomfield Gravel Mining Co.,* 53 Fed. 625 (C.C. N.D. Calif.); *United States* v. *Mississippi and Rum River Boom Co.,* 3 Fed. 548 (C.C. D. Minn.); cf. *United States* v. *San Jacinto Tin Co., supra; Cotton* v. *United States supra; Willamette Iron Bridge Co.* v. *Hatch, supra,* 125 U.S. at 13–14.

Accordingly, we conclude that these principles of non-statutory law may also be invoked by the United States to compel petitioners to remove the sunken

[47] These allegations were supported by affidavits to which were attached maps indicating the extent of these improvements (R. 85–86).

vessels or to recover from them the costs of removing the wrecks.[48]

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[48] There is no substance to petitioners' suggestion (Pet. Br. pp. 36–37) that liability for the cost of removing the chlorine may not be imposed upon them because the chlorine was removed under the provisions of the Disaster Relief Act, 42 U.S.C. 1855 *et seq.* That Act was enacted for the benefit of state and local governments, 42 U.S.C. 1855, to provide federal assistance in disaster situations. The Act does not purport, either expressly or impliedly, to relieve private tortfeasors of liability for the consequences of their negligence. Cf. *United States* v. *State Road Department of Florida*, 189 F. 2d. 591, 595 (C.A. 5), certiorari denied, 342 U.S. 903; *United States* v. *Perma Paving Co.*, *supra*, 322 F. 2d at 758.